Supreme Court, U.S.
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No. 90-1695

In the Supreme Court of the United States

OCTOBER TERM, 1991

MARTIN J. SCHWIMMER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner, an investment advisor, qualified as a "counsel" or "agent" of an employee benefit plan within the meaning of 18 U.S.C. 1954, which prohibits the receipt of payments by such a person because of the performance of actions for the benefit plan.

2. Whether Section 1954's exemption for bona fide compensation applies only if the fiduciary makes full disclosure to the benefit plan of his receipt of outside compensation.

3. Whether there was a violation of petitioner's attorney-client privilege requiring reversal of his conviction.

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OPINIONS BELOW

The opinions of the court of appeals (Pet. App. A1-A12, A13-A31) are reported at 924 F.2d 443 and 892 F.2d 237. The opinions of the district court (Pet. App. A32-A42, A43-A51, A52-A99) are reported at 700 F. Supp. 104, 706 F. Supp. 6, and 738 F. Supp. 654.

JURISDICTION

The judgment of the court of appeals (Pet. App. A100-A101) was entered on January 23, 1991. A petition for rehearing was denied on March 19, 1991. Pet. App. A102-A103. The petition for a writ of certiorari was filed on May 6, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted on one count of conspiring to conduct the affairs of an enterprise through a pattern of racketeering activity (18 U.S.C. 1962(d)); 76 counts of receiving illegal payments to influence the operations of employee benefit plans (18 U.S.C. 1954); one count of conspiring to defraud the United States (18 U.S.C. 371); and six counts of income tax evasion (26 U.S.C. 7201). He was sentenced to 10 years' imprisonment and a $1.62 million fine. He also was ordered to forfeit $4.5 million.[1] The court of appeals affirmed. Pet. App. A1-A12, A14-A15 & n.1.

1. The evidence at trial is summarized in the initial opinion of the court of appeals. Pet. App. A16-A21. It showed that petitioner was an investment advisor to employee benefit plans associated with Sheetmetal Workers Local Union 38 and Teamsters Local Union 810. Between 1981 and 1984, petitioner and co-defendant Mario Renda invested $95 million of the plans' funds in certificates of deposit (CDs) at banks and savings and loan associations. The investments were placed through Renda and his company, First United Fund, Ltd. In return, petitioner and Renda received more than $16 million in commissions from the banking institutions. The com-

[1] Petitioner was acquitted on one count of obstructing a grand jury investigation (18 U.S.C. 1503) and two counts of aiding and abetting income tax evasion (26 U.S.C. 7201). Co-defendant Mario Renda pleaded guilty to the RICO conspiracy count and one tax evasion count. He agreed to forfeit $4.25 million and to testify at petitioner's trial. Gov't C.A. Br. 2 n.1.

missions generally amounted to between one and two percent of the investment annually. *Ibid.*; Gov't C.A. Br. 3 & n.3.

Petitioner began giving financial advice to Local 38's benefit plans in 1971. He received an hourly fee but agreed to report any commissions he earned and to offset them against his fee. The plans' trustees gave petitioner investment guidelines that called for low-risk growth primarily through federally insured CDs. However, petitioner had complete authority to make investments, and his annual reports to the trustees did not break down the investments by amount or location. In 1981, petitioner became sole investment advisor to Local 810's two benefit plans, which then placed all their funds in CDs. Petitioner did not receive a fee from Local 810, and his investment recommendations were subject to final determination by the union president. However, between 1981 and 1985, petitioner made all but one of the plans' CD investments, totaling $72,910,000. Pet. App. A17-A20; Gov't C.A. Br. 4-5.

Shortly after petitioner became investment advisor to the Local 810 plans, he told Renda that he had union funds for long-term investment. Petitioner said that his "people" (presumably union officials) would have to be paid a fee of 7/8 of one percent on the investments, in cash. Petitioner told Joseph DeCarlo, who kept the books for Renda's company, that he would provide invoices to cover the checks that would have to be cashed to generate those fees. Pet. App. A17-A18; Gov't C.A. Br. 8.[2]

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[2] Between January 1982 and March 1984, petitioner cashed 210 First United checks, totalling $1,900,000, at a local store, and between December 1981 and March 1984, he cashed $1,212,725 in First United checks at another store. The checks

In December 1981, petitioner complained to Renda that all the commissions he received would be reflected as income to him for tax purposes, even though he was paying some of the proceeds to his "people." Petitioner therefore suggested that Renda open a separate bank account for the deposit of fees from the plans' long-term investments. Petitioner directed that the new account not appear on First United's records and that information concerning it not be made available to the company's auditors. Petitioner also said that the account should not be interest-bearing, so that reports would not be made to the IRS, and that it be closed (and a new one opened) every six months to avoid the attention of bank auditors. Renda opened the first of these "off book" accounts in December 1981 and closed it six months later. He then opened a new account at another bank and repeated the cycle approximately every six months. Renda and DeCarlo deposited commissions from petitioner's long-term CD investments into those accounts and did not report them to First United's outside accountants or to the IRS.[3] DeCarlo maintained separate records on the investments, and the banks wired the commission payments directly to whatever "off book" account was in operation at the time. Pet. App. A18; Gov't C.A. Br. 9-12.

Whenever Renda obtained a CD investment for the Local 38 or Local 810 plans, petitioner determined

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represented his share of commissions on the plans' investments. Pet. App. A19.

[3] Renda and Petitioner also failed to report the commission payments as income on their personal tax returns and on First United's 1983 and 1984 tax returns. Gov't C.A. Br. 10 & n.9.

the interest rate and other terms of the investment.[4] In his own negotiations with bank officers, Renda typically said that a "discount" on the commission was being returned to the union. In reality, the "discount" represented their commissions plus the kickback of 7/8 of one percent. Petitioner and Renda also told the "discount" story to First United account executives to forestall any claims against the commissions. Pet. App. A18-19; Gov't C.A. Br. 11-12 & n.12.

Petitioner met annually with the trustees of the Local 38 plans, but it was not until April 1986 that he reported that some of the their CD investments were not insured. Later in 1986, after the trustees asked petitioner about his relationship with brokerage firms, he signed a letter falsely stating that he had not received any commission from any broker for placing CDs for their plans, and he told the trustees that he had not conducted Local 38 business with Renda's company. In addition, petitioner failed to offset his commissions against fees from the Local 38 plans, contrary to his agreement with the plans. Although petitioner had no agreement with the Local 810 plans about payment for his investment services,

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[4] On one occasion, when a savings and loan representative contacted Local 810 directly and offered it a better rate than Renda had negotiated, petitioner falsely told the union's president and comptroller that the offer had been withdrawn and that the person who had contacted them was another broker. Petitioner succeeded in getting the union to accept the original package that Renda had negotiated, from which petitioner and Renda realized a commission of more than $1.5 million. Under the direct offer to the union, their commission would have been only $93,750 and the plans would have received an additional one percent return on their investment. Gov't C.A. Br. 12-13.

he never told the union how much he was paid or that his commissions had the effect of reducing the return on their investments. Pet. App. A19-A21; Gov't C.A. Br. 5, 18-19.

2. When the government began to investigate petitioner's and Renda's activities, they each retained counsel. The lawyers hired an accountant, Ralph Glickman, to analyze the financial transactions that the government was investigating. In July 1987, Glickman was subpoenaed to appear before the grand jury. He testified that he had provided commission income figures to Renda's accountant for the preparation of Renda's 1983 and 1984 tax returns, but, relying on the attorney-client privilege, he declined to identify the basis for that analysis. In August 1988, three months after Renda pleaded guilty and agreed to cooperate with the government, Glickman met with the lawyer in charge of petitioner's prosecution. Glickman told the prosecutor that he had arrived at the figures in Renda's tax returns by examining bank statements concerning the "off book" accounts and DeCarlo's records, all of which already were available to the government. At the prosecutor's request, Glickman turned over his work papers to the IRS case agents. Pet. App. A21-A23.

Glickman did not testify at trial, and the work papers were not introduced into evidence. Petitioner nevertheless moved to dismiss the indictment on the basis of an asserted violation of his attorney-client privilege. The district court denied that motion, stating that it had reviewed Glickman's grand jury testimony and the trial evidence and found no violation of the attorney-client privilege. Pet. App. A25.

3. On petitioner's appeal of his conviction, the court of appeals initially remanded for an evidentiary hearing on his attorney-client privilege claim.

Pet. App. A13-A31. On remand, the district court held a two-day hearing, at which the two IRS case agents and the lead prosecutor testified. After considering that testimony and Glickman's work papers, the court assumed, arguendo, that petitioner had given privileged information to Glickman, but found that the government had not directly or indirectly used any of that information. *Id.* at A4-A5.

The court focused on three meetings between Glickman and the prosecution team in April, May, and August 1988. It found that the first two meetings involved negotiations over the amount that Renda, who already had pleaded guilty, would forfeit to the government, and that the government did not obtain any privileged information. With respect to the final meeting, the court found that the prosecution again did not obtain any privileged information, that prosecutor Bruce Maffeo had cautioned Glickman not to reveal any conversations he had with petitioner, and that Maffeo inquired about the records Glickman had examined, not the substance of his analysis. Pet. App. A4-A5, A70-A76.

The court next found, based on "overwhelming evidence," that the government had not made any derivative use of the work papers, noting that the government was prepared for trial well before it obtained the work papers and that its case was based "solely on the investigative work of the agents." Pet. App. A82-A83, A84; see *id.* at A77-A87. The court credited the testimony of IRS Agent Eugene Brozen (who acquired the papers) that he told Maffeo that the papers contained 'nothing new," as well as Maffeo's statement that he had not seen the papers until the day of the remand hearing and that their receipt by the prosecution team was a "complete nonevent." The court also found that no use of the

papers was made by Brozen and Agent Frank Devine (who said he never saw them) in preparing the case, *id.* at A5, A79-A80, and that no use of the work papers was made on cross-examination. *Id.* at A83-A84. Finally, the court rejected petitioner's arguments that Agent Brozen's statement that the work papers contained nothing new was itself a use of the papers, and that the government might have used the papers in deciding whether to emphasize particular evidence. In the court's view, such alleged uses were "wholly conjectural and insubstantial." Pet. App. A82-A84 (quoting *United States* v. *Mariani*, 851 F.2d 595, 601 (2d Cir. 1988), cert. denied, 490 U.S. 1011 (1989))).

4. Following the remand, the court of appeals affirmed petitioner's convictions. Pet. App. A1-A12. It first held that the district court's finding that the government had not improperly used information protected by the attorney-client privilege was "amply supported by the evidence produced at the hearing." *Id.* at A7. The court further held that although the government agents had intentionally obtained the work papers, any intrusion into a privileged area did not warrant reversal because the prosecutors had cautioned Glickman not to reveal any confidential communications and because petitioner was not prejudiced by the government's acquisition of the papers. *Id.* at A8.

The court of appeals next approved the district court's jury instructions concerning 18 U.S.C. 1954. Pet. App. A9-A10. That statute bars the solicitation or receipt of any kickback, commission, or other thing of value by "an administrator, officer, trustee, custodian, counsel, agent, or employee of any employee * * * benefit plan * * * because of or with intent to be influenced with respect to, any of the actions, de-

cisions, or other duties relating to any question or matter concerning such plan." In this case, the jury was instructed that it must find that petitioner was either a "counsel" or an "agent" of the plan. The court of appeals noted that, under existing precedent, a person need not be formally designated as counsel or agent in order to be covered by the statute. *Id.* at A9.[5] Here, the evidence showed that petitioner not only regularly gave financial advice to the benefit plans, but also made all investments for the Local 38 plans over a 15-year period and invested more than $72 million for the Local 810 plans over a five-year period. Thus, petitioner both had the capacity to influence the plans' investment decisions and "actually advised the plans and made investments on their behalf." In the court's view, the receipt of outside payments because of such conduct was clearly covered by Section 1954. *Id.* at A9-A10.

Finally, the court of appeals rejected petitioner's contention that the payments he received in connection with his investments for the Local 810 plans were excluded from the prohibition in 18 U.S.C. 1954 by a proviso permitting a person to accept "bona fide" payments "for services actually performed in the regular course of his duties." Pet. App. A11. The court agreed with the district court (see *id.* at A32-A42) that the exception would be applicable only if petitioner had made full disclosure of the payments. The court reasoned that " 'bona fide' literally means in good faith, exclusive of fraud or deceit," and that

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[5] The district court also instructed the jury that petitioner had that status if he "was in a position to give advice or recommendations that, although not controlling in the final sense, would have a significant influence on the final investment decisions." Gov't C.A. Br. 21.

"[i]t cannot be said that one who receives a commission from a financial institution for placing employee benefit plan funds, without disclosing to the plan the actual commissions received, is acting in good faith." *Id.* at A11. The court stated that any other interpretation would run counter to the statute's purpose of imposing strict fiduciary duties on persons who handle investments and make decisions for employee benefit plans. *Ibid.*

ARGUMENT

1. Petitioner contends that the court of appeals erroneously construed both the basic prohibition in 18 U.S.C. 1954 and its exception for "bona fide" payments.

a. Contrary to petitioner's contention (Pet. 17-26), the court of appeals correctly held that petitioner was covered by 18 U.S.C. 1954. That statute prohibits any "administrator, officer, trustee, custodian, counsel, agent, or employee" of an employee benefit plan from receiving anything of value because of or with the intent to be influenced in his actions for the plan.

In this case, the trial court instructed the jury that it must find that petitioner was either an "agent" of or "counsel" to the Local 38 and Local 810 benefit plans and that he exercised either direct or indirect control over them. As the court below found, Pet. App. A9-A10, the evidence amply supported the jury's finding that those conditions were met. Petitioner for many years provided regular financial advice to the plans and invested their funds, including $72 million for the Local 810 plans. In fact, no Local 810 investment was placed until petitioner approved the interest rate, the length of the CD investment, and his commission share.

Petitioner is incorrect in asserting (Pet. 22) that the court of appeals held that "it is irrelevant whether a defendant occupies one of the specified positions." See also Pet. 19-20. Instead, the court quoted the relevant statutory text and concluded that petitioner occupied one of the specified positions, as agent or counsel. Pet. App. A9-A10. Contrary to petitioner's suggestion (Pet. 22-23), the fact that petitioner was not an employee of the benefit plans, but was instead an investment advisor who worked for others as well, does not remove him from the scope of Section 1954. Twenty years ago, the Second Circuit affirmed the conviction of a similar independent contractor who performed investment advisory services for a benefit plan. In *United States* v. *Russo*, 442 F.2d 498 (2d Cir. 1971), cert. denied, 404 U.S. 1023 (1972), the court held that a certified public accountant was covered by Section 1954 because he provided advice to a union pension fund on a regular basis. The court concluded that the CPA's activities over a period of time "established an agency relationship with the Fund and, therefore, [he] became a member of the class to which the statute is addressed." *Id.* at 502.

Petitioner concedes that his receipt of payments from banking institutions on account of his services to the Local 38 plans was prohibited by Section 1954, because he was a financial advisor to those plans and was paid by them. See Pet. 4. As explained above, petitioner also served as an investment advisor to the Local 810 plans, exerted substantial influence over their investment decisions, and made virtually all of their CD investments. On this record, the jury reasonably could conclude that petitioner acted in the capacity of counsel or agent of those plans, even though the

plans did not pay him a salary and did not directly compensate him through agreed-upon commissions.[6]

The application of Section 1954 is not limited to persons who are paid by an employee benefit plan; it is sufficient that the defendant occupied one of the positions specified in the statute. The court of appeals also correctly held that a person need not be "designated formally" to occupy one of the covered positions, as long as he in fact occupied it and exercised the requisite degree of control. Pet. App. A9; see *United States* v. *Robilotto*, 828 F.2d 940, 946 (2d Cir. 1987), cert. denied, 484 U.S. 1011 (1988); *United States* v. *Friedland*, 660 F.2d 919, 925 (3d Cir. 1981), cert. denied, 456 U.S. 989 (1982); *United States* v. *Palmeri*, 630 F.2d 192, 199 (3d Cir. 1980), cert. denied, 450 U.S. 967 (1981). The courts have recognized that "the broad language used in the statute reflects Congress's intent to reach all fiduciaries who profit (other than by their regular compensation) as the result of their decisions to invest union pension funds." *United States* v. *Romano*, 684 F.2d 1057, 1064 (2d Cir.), cert. denied, 459 U.S. 1016 (1982); *United States* v. *Pieper*, 854 F.2d 1020, 1025 (7th Cir. 1988); see also *United States* v. *Schwartz*, 785 F.2d 673, 680-681 (9th Cir.), cert. denied, 479 U.S. 890 (1986); *United States* v. *Soures*, 736 F.2d 87, 89-90

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[6] Contrary to petitioner's assertion (Pet. 14-15), the decision below does not reach "every bank, insurance company, brokerage house, or investment firm (as well as their officers and employees)" that has successfully pursued business from an employee benefit plan, as well as any "business entity which supplies goods or services of any sort to an employee benefit plan." Here, the jury found that petitioner had actually assumed the position of counsel or agent of the plans themselves, based on a record showing that he substantially controlled their investment decisions.

(3d Cir. 1984), cert. denied, 469 U.S. 1161 (1985); *United States* v. *Friedland*, 660 F.2d at 927.

b. Petitioner also objects (Pet. 26-30) to the holding below that in order to avail himself of the "bona fide" payments exemption in Section 1954, he was required to make full disclosure to the plans about the substantial outside payments he received on account of his role with respect to the investment of the plans' funds. Pet. App. A11, A32-A42. This objection also is without merit.

As the court of appeals noted, the ordinary meaning of the term "bona fide" is "in good faith, exclusive of fraud or deceit." Pet. App. A11. See *Webster's Third New International Dictionary* 250 (1986) ("in good faith without fraud or deceit"). Similarly, *Black's Law Dictionary* (6th ed. 1990), defines "bona fide" to mean "[i]n or with good faith; honestly, openly, and sincerely; without deceit or fraud." *Id.* at 177. A person who serves as an agent or counsel of an employee benefit plan and who receives substantial payments from a financial institution for placing the plan's funds in that institution —without disclosing those payments to the plans' trustees—does not act openly and in good faith.

As both courts below found, Pet. App. A11, A32-A42, this conclusion is strongly reinforced by the background and purposes of Section 1954. In 1958, Congress enacted the Welfare and Pension Plans Act, Pub. L. No. 85-836, 72 Stat. 997, to promote disclosure of the operations of employee plans for the benefit of plan participants. See Pet. App. A34. Four years later, Congress revisited the subject and found that the "greatest single abuse" in the administration of benefit plans was "the kickback or payoff to influence the investment of the assets of the funds," and that

there was an "urgent need for legislation" to ensure that the facts relating to the plans' finances, including "commissions," are "brought into the open to permit self-policing and self-appraisal" by plans and their beneficiaries. S. Rep. No. 908, 87th Cong., 1st Sess. 4-5 (1961); see also *id.* at 10-11; H.R. Rep. No. 998, 87th Cong., 1st Sess. 1-2 (1961). Section 1954 was enacted as part of the 1962 legislation to provide criminal sanctions for the receipt of kickbacks and "conflict-of-interest payments," S. Rep. No. 908, *supra*, at 7; *United States* v. *Romano*, 684 F.2d at 1064, and "violations of trust," 108 Cong. Rec. 1924 (1962) (remarks of Sen. McNamara), and thereby to "requir[e] all fiduciaries of benefit plans to be honest and straight-forward when handling union funds," Pet. App. A37-A38. In light of the statutory purposes, the district court properly concluded that "[i]t would be wholly inconsistent with the Act if a fiduciary could determine for himself what bona fide compensation should amount to." *Id.* at A40; see also *id.* at A11 (petitioner's interpretation would "weaken[] the force of the statute through which Congress intended to regulate strictly the administration and operation of employee benefit plans").

This conclusion also is consistent with principles governing an agent's receipt of payments in connection with the performance of his duties. Such payments must be disclosed to the principal in order to avoid a conflict of interest. *United States* v. *Carter*, 217 U.S. 286, 306 (1910); *United States* v. *Kenealy*, 646 F.2d 699, 704 (1st Cir.), cert. denied, 454 U.S. 941 (1981); *United States* v. *Kearns*, 595 F.2d 729, 734 (D.C. Cir. 1978). Because petitioner concedes (Pet. 24) and the legislative history shows that Section 1954 was intended to prohibit all "conflict-of-

interest" payments, full disclosure to the trustees of the benefit plan is necessary in order for payments from financial institutions to be "bona fide" payments that are permitted under Section 1954.

In this case, as the court of appeals found, "[t]he evidence reveals that the trustees of Local 810 did not know that [petitioner] was receiving compensation from financial institutions through First United, the vehicle used by [petitioner] and his co-defendant to conduct their business." Pet. App. A11. The court of appeals also pointed out that although "Local 810's comptroller testified that he assumed [petitioner] was receiving fees from a source other than the Local," "he did not actually learn of [petitioner's] commissions until an investigation by Local 810 was conducted." *Ibid.*; see Gov't C.A. Br. 41-42. Contrary to petitioner's apparent contention (Pet. 29), an assumption by the Local's comptroller does not constitute actual disclosure by petitioner, much less full disclosure of the amount of the commissions he was paid and the impact those commissions had on the rates of return the plans received on their investments. For that reason, petitioner's actions hardly qualify as "bona fide"—*i.e.*, open and in good faith, without fraud or deceit. *Ibid.*[7]

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[7] Petitioner errs in asserting (Pet. 28-29) that this interpretation will "wreak havoc" with the disclosure requirements of the Employee Retirement Income Security Act of 1974, 29 U.S.C. 1001 *et seq.* Under regulations issued by the Secretary of Labor to implement the prohibited-transaction provisions of ERISA, 29 U.S.C. 1106-1108, a fiduciary authorized to manage plan assets may receive outside compensation only if it is disclosed and approved by an independent plan fiduciary who has no personal stake in the transaction. Moreover, that approval must be secured prior to receipt of the compensation. See 49 Fed. Reg. 13208 (1984).

2. Petitioner claims (Pet. 33-35) that the government's acquisition of Glickman's work papers constituted a *per se* violation of his Sixth Amendment rights requiring automatic reversal of his convictions. The court of appeals correctly rejected that argument, holding instead that unless the government's conduct is "manifestly and avowedly corrupt," a defendant must show prejudice in order to obtain reversal based on a violation of his attorney-client privilege. Pet. App. A8. The court found that the prosecutor's actions here were not of that sort, and petitioner does not argue otherwise. Petitioner likewise does not challenge the concurrent finding by both courts below, based on the district court's two-day hearing and thorough review of the evidence, that he suffered no prejudice. In these circumstances, petitioner is not entitled to reversal on account of the prosecutor's acquisition of the work papers. *Ibid.*

The ruling on this issue accords with the recognition by this Court that a *per se* rule of reversal is not appropriate for violations of the attorney-client privilege; rather, a defendant must show "at least a realistic possibility" of prejudice in order to prevail. *Weatherford* v. *Bursey*, 429 U.S. 545, 558 (1977). More recently, the Court held that even a deliberate violation of a defendant's relationship with his lawyer does not warrant relief unless there is a showing of "demonstrable prejudice[] or substantial threat thereof." *United States* v. *Morrison*, 449 U.S. 361, 365-366 (1981). Other courts of appeals likewise have required a showing of prejudice before reversing a conviction based on a Sixth Amendment violation. See, *e.g.*, *United States* v. *White*, 879 F.2d 1509, 1514 (7th Cir. 1989), cert. denied, 110 S. Ct. 1471 (1990); *United States* v. *Dyer*, 821 F.2d 35, 38 (1st

Cir. 1987); *United States* v. *Singer*, 785 F.2d 228, 234 (8th Cir.), cert. denied, 479 U.S. 883 (1986); *Clutchette* v. *Rushen*, 770 F.2d 1469, 1471 (9th Cir. 1985), cert. denied, 475 U.S. 1088 (1986). Because there is no circuit conflict on this issue, and because petitioner does not challenge the finding below that he was not prejudiced by the government's conduct, review by this Court is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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